2287/04

Filed on 16/6/04
by Shri Ugra Mohan Banerjee
Advocate

R. to D.R. (J)
16/6/04

(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

CR. Appeal No. 548 / 2004

APPELLANT ACCUSED (in jail)	:	Kulashwar Dhrub, S/o. Tulshi Dhrub, aged about 26 years, Occupation - driver, R/o. Aanapara, Makeshwar Board, Dhamtari, P.S. Kotwali, Dhamtari, Distt. Dhamdari (C.G.)
		VERSUS
RESPONDENT PROSECUTION	:	State of Chhattisgarh.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE 1973.

A.F.R.

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench: Hon'ble Shri **DILIP RAOSAHEB DESHMUKH, J.**

Criminal Appeal Number-548/2004

Kuleshwar Dhruw

Vs.

State of Chhattisgarh

PRESENT: -

Ku. Meenu Banerjee, learned counsel for the appellant.
Shri Parag Kotecha, Panel Lawyer for the State.

ORAL JUDGMENT
(Delivered on 29-06-2006)

Appellant Kuleshwar was convicted under Section-20 (B) (ii) (B) of the Narcotics Drugs & Psychotropic Substances Act. 1985 (hereinafter referred to as the 'Act of 1985") and was sentenced to undergo rigorous imprisonment for 3 years & 6 months and also to fine of Rs.15,000/- and in default of payment of fine to undergo additional rigorous imprisonment for 1 year by Shri R.S.Sharma, Special Judge (N.D.P.S. Act.), Bastar at Jagdalpur in Special Case Number-52/2003 vide judgment dated 27-02-2004.

2. Briefly stated the prosecution story is that on 27-11-2003 upon receiving secret information that the appellant and one Hemant were transporting contraband ganja on a motorcycle, Sub Inspector

Arvind Kumar Dwivedi PW-1, Station House Officer, Pharasgaon after recording the said information proceeded to the spot with witnesses and intercepted the appellant Kuleshwar who was driving Hero Honda Motorcycle bearing Registration No.C.G.-05-8198. Another person Hemant, who was the pillion rider, was carrying 4 K.G. & 500 Grams ganja in his lap. 5 k.G. contraband ganja was also tied down in the rear of the motorcycle. After completing the necessary legal formalities Sub Inspector Arvind Kumar Dwivedi PW-1 seized the contraband ganja contained in 1 fertilizer bag alleging it to be in possession of the appellant Kuleshwar along with Hero Honda Motorcycle bearing Registration No. CG-05-8198 vide seizure memo Ex.P-14. Rajkumar PW-4, who was present at the spot weighed and found the contraband ganja inside the bag to be 5 k.G. Two samples of 50 Grams each were taken from the aforesaid quantity of ganja and were sealed and remaining quantity of ganja was also sealed. Seal Panchnama was prepared vide Ex.P-17 mentioning that the brass seal bore the impression "Police Station M.P.". However, specimen impression of the same was not affixed on the Seal Panchnama Ex.P-17. On 27-11-2003, one white fertilizer bag containing 5 K.G. ganja in a sealed condition and two sealed sample packets of 50 Grams each allegedly taken from the aforesaid quantity of ganja and Honda Motorcycle bearing Registration No. CG-05-8198 were entrusted for safe custody to Head Constable/Malkhana Moharrir Jaydev Bhoi which was entered into Malkhana Register Ex.P-32(C) as mentioned above. On 03-12-2003 vide memo Ex.P-30 of Superintendent of Police, Bastar at

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Jagdalpur, one sample packet of ganja was sent for chemical analysis to the Forensic Science Laboratory, Raipur through Constable Gend lal Sahu No.80 which was received in the Forensic Science Laboratory, Raipur on 06-12-2003. Vide report dated 13-01-2004 Ex.P-31, it was opined that the sample packets contained ganja. In the report, Forensic Science Laboratory drew the impression of the seal which was found on the sample packet as "Police Station, Pharasgaon, M.P.". After completion of investigation, the appellant was prosecuted.

3. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined 4 witnesses. Relying upon the evidence led by the prosecution, the learned trial Judge convicted and sentenced the appellant as aforesaid in para-1.

4. Ku. Meenu Banerjee, learned counsel for the appellant has assailed the impugned judgment on two grounds. Firstly that the possibility that the sample analysed by the Forensic Science Laboratory had been tampered with could not be ruled out in view of the fact that the impression of the seal found on the sample packet by the Forensic Science Laboratory did not match with the impression of the seal described in the Panchnama Ex.P-17. It was pointed out that entry in the Malkhana Register did not show as to on what date the sample packet was taken out from the Malkhana for being entrusted to Constable Gend lal Sahu No.80. It was also contended that Constable Gend lal Sahu No.80 who was entrusted with the

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sample packet on 03-12-2003 was not examined and the delay in reaching the sample packets by him to the Forensic Science Laboratory was not explained. It was also contended that Malkhana Register Ex.P-32 (C) clearly shows that one white fertilizer bag containing 5 K.G. of ganja in a sealed condition was also deposited in the Malkhana for safe custody along with two sample packets of 50 Grams each ganja in a sealed condition. Since, the quantity of ganja seized from the possession of the appellant was alleged to be 5 K.G., it was extremely doubtful that the samples sent for chemical analysis to the Forensic Science Laboratory had been taken from the aforesaid quantity of ganja alleged to have been seized from the appellant. It was also contended that the prosecution had failed to prove that the alleged contraband ganja weighing 5 K.G. was in the conscious possession of the appellant since Sub Inspector Arvind Kumar Dwivedi PW-1 had admitted that the appellant who was driving the motorcycle was not the owner thereof and it was the pillion rider Hemant who was carrying a bag containing contraband ganja in his lap and another bag was tied down at the rear of the motorcycle. Lastly, it was contended that non-compliance of Section-55 of the Act of 1985 by Sub Inspector Shri Arvind Kumar Dwivedi PW-1 renders the conviction of the appellant bad in law. Reliance was placed on ***Avtar Singh & Others Vs. State of Punjab*** reported in (2002) 7 Supreme Court Cases 419, ***Narcotics Control Bureau, Jodhpur Vs. Murlidhar Soni and Others*** reported in 2004 (2) A.N.J. (S.C.) and ***Trinath Goudo Vs.***

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State reported in **1996 (1) CRIMES 607** in support of the above contentions.

5. On the other hand, Shri Parag Kotecha, learned Panel Lawyer for the State argued in support of the impugned judgment while contending that there has been substantial compliance with the provisions of the Act of 1985 regarding sealing of the sample packets and the evidence led by the prosecution did not show any possibility of tampering of the sealed sample packet sent to the Forensic Science Laboratory.

6. Having heard rival contentions, I have perused the record of Special Case No.52/2003 and have minutely gone through the evidence led by the prosecution. In a prosecution for an offence under Section-20 of the Act of 1985, it is the duty of the prosecution to establish beyond the shadow of doubt that the samples taken from the quantity of ganja alleged to have been seized from the appellant were sealed and a specimen impression of the seal was prepared. It is also necessary for the prosecution to establish that at the time of entrustment of the samples in the Malkhana, Station House Officer of the Police Station had affixed his seal on the sample packets as also the remaining quantity of contraband ganja. In other words, the prosecution must establish beyond the shadow of any doubt that the seal affixed on the sample packets not only at the time of seizure but also at the time of entrustment in the Malkhana remained intact till

the sample packets was delivered at the Forensic Science Laboratory for chemical analysis.

7. A perusal of the specimen impression of the seal prepared by the Sub Inspector Arvind Kumar Dwivedi PW-1 vide Ex.P-17 clearly shows that specimen impression of the brass seal used to seal samples was not affixed on the panchnama. However, the description of the seal used to seal sample packets as given in Panchnama Ex.P-17 goes to show that it was a brass seal containing the words "Police Station, M.P." A perusal of the report of the Forensic Science Laboratory Ex.P-31 shows that the impression of the seal found on sample packets was drawn by the Forensic Science Laboratory as "Police Station Pharasgaon M.P.". It is thus clear that the words "Pharasgaon" were not present on the seal affixed on the sample packets at the time of sealing contraband ganja and the sample packets which does not rule out the possibility that the seal on the sample packet had been tampered with.

8. A perusal of the Malkhana Register Ex.P-32(C) goes to show at item No.1 that 5 k.G. of ganja in a white fertilizer bag in a sealed condition was deposited at the Malkhana and shows at item No. (ii) that two sample packets of 50 grams each ganja alleged to have been taken from the aforesaid quantity of ganja seized were also deposited. If two sample packets of 50 grams each had been lifted from 5 K.G. of ganja allegedly seized from the possession of the

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appellant, the white fertilizer bag would have been contained 4 K.G. & 900 Grams of ganja. The description in the Malkhana Register Ex.P-32(C) does not rule out the possibility that the sample packets entrusted for safe custody at the Malkhana did not represent the quantity of ganja allegedly seized from the possession of the appellant. In his testimony Sub Inspector Arvind kumar Dwivedi PW-1 did not state anything about the description of the seal used. He also did not state that before entrustment in the Malkhana he had put the seal of the Station House Officer of P.S. Pharasgaon on the sample. Thus, there has been total non compliance of the Section-55 of the Act of 1985 in the aforesaid facts and circumstances.

9. The entries in the Malkhana Register also do not show the date on which the sample packets were taken out from the Malkhana for entrustment to Constable Gend lal Sahu No.80 for taking to the Forensic Science Laboratory. The prosecution did not examine Constable Gend lal Sahu no.80 who took the sample packet with a memo of Superintendent of Police, Bastar at Jagdalpur Ex.P-30. As per memo Ex.P-30 Constable Gend lal Sahu took the sample packet on 03-12-2003 and reached the Forensic Science Laboratory, Raipur on 06-12-2003. There is nothing on record to show as to where and in whose possession the sample packet was kept and in what condition during this period. In the facts and circumstances mentioned above, the possibility that the sample packet sent for chemical analysis to the Forensic Science Laboratory had been tampered with could not be

ruled out in this case and on this count alone, conviction of the appellant under Section-20(B) (ii) (B) of the Act of 1985 is liable to be set aside.

10. Possession is the core ingredient of an offence under Section-20(B) (ii) (B) of the Act of 1985. The prosecution has to establish that contraband ganja was seized from the conscious possession of the appellant. Sub Inspector Arvind Kumar Dwivedi PW-1 and Head Constable Shekhar lal Kashyap PW-3 have admitted that the appellant was driving the motorcycle whereas it was the pillion rider Hemant who was holding one bag and one more bag was tied down in the carrier of the motorcycle in the rear. Rajkumar PW-4 has stated that the other bag was kept inside the dicky of the motorcycle. Para-53 of the impugned judgment clearly shows that the appellant Kuleshwar was not the owner of the motorcycle. It appears that Hemant was separately prosecuted for the offence under Section-20(B) (ii) (B) of the Act of 1985. It is beyond comprehension as to how Sub Inspector Arvind Kumar Dwivedi PW-1 came to the conclusion that the appellant was in conscious possession of 5 K.G. of contraband ganja which was tied in the rear of the motorcycle. Not being the owner, the appellant was merely driving the motorcycle while it was Hemant who held one bag on his lap while the other bag was tied behind him. In the facts and circumstances mentioned above, it cannot be ruled out that it was Hemant and not the appellant who was in conscious possession of the

fertilizer bag also, tied at the rear containing 5 K.G. of contraband ganja at the time of seizure.

11. Having thus considered the evidence led by the prosecution in its entirety and also the rival submissions, the following points emerge:-

(A) The possibility that the seal on the sample packet examined by the Forensic Science Laboratory had been tampered with could not be ruled out.

(B) Conscious possession of the appellant over the contraband ganja alleged to have seized is not established beyond doubt.

(C) Non compliance of the Section-55 of the Act of 1985 in the facts and circumstances of the case renders the conviction of the appellant bad in law.

12. In the aforesaid facts and circumstance, conviction of the appellant under Section-20(B) (ii) (B) of the Act of 1985 and the sentence awarded thereunder by the learned trial Judge are liable to be set aside.

13. In the result, this appeal is allowed. Conviction of the appellant under Section-20(B) (ii) (B) of the Act of 1985 and the sentence awarded thereunder by the learned trial Judge are set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case. Fine if paid, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge